82-1043

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. _____

A. AIDA KELSAW,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,
a Utah corporation,

Respondent.

Petition For Certiorari From
The United States Court of Appeals
For The Ninth Circuit

PETITION FOR CERTIORARI

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A. AIDA KELSAW,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,
a Utah corporation,

Respondent.

PETITION FOR CERTIORARI

QUESTION PRESENTED FOR REVIEW

Whether the spouse of an injured railroad employee may recover for loss of consortium under the Federal Employers' Liability Act?

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JURISDICTION

The Ninth Circuit entered its judgment in the instant case on September 9, 1982. Petitioner is seeking review pursuant to 28 U.S.C. § 1254(1).

STATUTES

The relevant statutory provisions for purposes of review are as follows:

1. The Federal Employers' Liability Act, 45 U.S.C. § 51:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit

of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases" (approved April 22,

1908) [45 U.S.C. §§ 51 et seq.] as the same has been or may hereafter be amended. (Apr. 22, 1908, ch 149, § 1, 35 Stat. 65; Aug. 11, 1939, ch 685, § 1, 53 Stat. 1404.)

2. The Jones Act, 46 U.S.C. § 688:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal

> office is located. (Mar. 4, 1915, ch 153, § 20, 38 Stat. 1185; June 5, 1920, ch 250, § 33, 41 Stat. 1007.)

3. The Death On The High Seas Act, 46 U.S.C. § 762:

> The recovery in such suit shall be fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought. (Mar. 30, 1920, ch 111, § 2, 41 Stat. 537.)

STATEMENT OF THE CASE

Petitioner, the wife of an injured railroad employee, brought this action against Defendant for damages due to loss of consortium. Jurisdiction of the Federal Court was invoked pursuant to 28 U.S.C. § 1331. Petitioner's claim is based upon the Federal Employers' Liability

Act (FELA), 45 U.S.C. §§ 51 et seq.

The United States District Court for the District of Oregon dismissed the action pursuant to Rule 12 of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. Petitioner's subsequent Motion for Reconsideration was denied.

Petitioner then appealed the District Court's dismissal of her Complaint to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit affirmed the District Court's judgment.

ARGUMENT

Petitioner argues that Congress did not intend to preclude damages under the FELA for loss of consortium. The FELA does not contain explicit language limiting recovery to pecuniary losses. Any such limitation was judicially created

based upon what now are considered to be outmoded objections.

1. Background: The "Roots" of Loss of Consortium.

(a) What constitutes "loss of consortium"?

The concept of "consortium" includes both tangible and intangible elements. The tangible elements consist of support and services of the other spouse, while the intangibles are such items as love, companionship, affection, society, sexual relations, comfort and solace. (See 74 ALR 3d 809.)

(b) Historical basis and current status of recovery for loss of consortium.

In the early 1800's, a husband's right to maintain an action for loss of consortium was recognized and sustained. (See 21 ALR 1519.) The reasoning which

prevailed at the time was that a wife owed a duty to her husband to provide conjugal support and assistance. Therefore, anyone who tortiously impaired her ability to perform such a duty deprived her owner (husband) of the right to his "consortium." In contrast, a wife did not have a corresponding common law cause of action for loss of her husband's consortium, basically because she could not sue in her own name for a personal injury. (See 41 Am Jur 2d, Husband and Wife, § 457.)

A more general objection to allowing recovery for loss of consortium, particularly to the loss of society and companionship, was the incapability of measuring such losses by a pecuniary standard. (See, for example, Michigan Central Railroad Company v. Vreeland, 227 U.S. 59, 73 [1913].) However, this objection is based upon a questionable

foundation because during the same period of time a husband was not denied the right to recover for loss of consortium. In addition, no matter how intangible, such losses were and are undeniably real. Mobil Oil Corporation v. Higginbotham, 436 U.S. 618, 623 (1978). Thus, over time, such objections have been eroded so that currently a cause of action for loss of consortium by a wife has been upheld under common law (e.g. Hitaffer v. Argonne Co., 183 F.2d 811 [1950], cert. den. 340 U.S. 852, overruled on other grounds, Smither & Co. v. Coles, 242 F.2d 220 [1957], cert. den. 354 U.S. 914) and is permitted by a clear majority of states. (American Export Lines, Inc. v. Alvez, 446 U.S. 274, 284 fn 11 [1980].)

2. Loss of Consortium Under the FELA.

The text of Section 51 of the

FELA does not state that damages for loss of consortium shall not be permitted, nor does it limit damages to pecuniary losses. The statute allows recovery for injury or death to a railroad employee resulting from a railroad employer's negligence. Specifically, the statute says:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and,

if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purpose of this Act be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases" (approved April 22, 1908) [45 U.S.C. §§ 51 et seq.] as the same has been or may hereafter be amended. (Emphasis ours)

(a) Early Supreme Court Cases

In 1913, the wife of a deceased railroad employee sued the railroad company under the FELA for the wrongful death of her husband. Michigan Central Railroad v. Vreeland, supra. The Supreme Court held that a railroad employer's liability under the FELA was limited to pecuniary losses. In reaching this result, the Court did not rely upon the express language of the statute, but instead looked to the judicial interpretation given to Lord Campbell's Act. Michigan Central Railroad v. Vreeland, supra at 69. The Court explained that the limitation to pecuniary losses was due directly to the problem of valuation, i.e., that the loss of society and companionship was an "inestimable loss." Michigan Central Railroad v. Vreeland, supra at 71. The Court did not set out a rigid and inflexible rule as to

defining pecuniary losses, but admitted that such a "hard and fast" rule was impossible. Michigan Central Railroad v. Vreeland, supra at 72. The Court primarily seemed to be concerned with the broad latitude of an instruction given to the jury in assessing damages, and also with the lack of evidence on the record as to the loss of service, care and advice suffered by the wife. Michigan Central Railroad v. Vreeland, supra at 73-74.

In 1917, the Supreme Court faced another issue concerning the scope of the FELA. The Court held that the FELA was the exclusive remedy available to employees who suffered injuries while in the employment of interstate railroad carriers. New York Central R.R. Co. v. Winfield, 244 U.S. 147 (1917). (See also, Erie Railroad Co. v. Winfield, 244 U.S. 170 [1917] and New York Central & Hudson River Railroad

Co. v. Tonsellito, 244 U.S. 360 [1917].) The Court emphasized that the congressional intent behind the FELA was to have a national law providing uniformity across the states for the liability of interstate railroad carriers. New York Central Railroad Co. v. Winfield, supra at 150.

(b) Lower Court Cases

Since these early decisions, the Supreme Court has not readdressed the above issues. More recently, lower courts have been cited as addressing specifically the loss of consortium issue, and such cases have relied upon the above early statements to deny such a cause of action. (e.g., Jess v. Great Northern Railway Co., 401 F.2d 535, 536 [9th Cir. 1968]; Anderson v. Burlington Northern, Inc., 469 F.2d 288 [10th Cir. 1972]; Spinola v. New York Central Railroad, 33 A.D. 2d 74, 305 N.Y.S. 2d 437, 438 [1969]; and Prata

v. National Railroad Passenger Corporation, 70 A.D. 2d 114, 420 N.Y.S. 2d 276 [1979].) However. to demonstrate the lack of clarity and the lack of comprehensiveness of these lower court decisions, they are addressed more specifically below.

In Jess v. Great Northern Railway Company, supra, the Ninth Circuit held that a wife of a railroad employee could not recover for loss of consortium under the FELA after her husband had been denied recovery under the FELA. The Court emphasized the exclusive remedy of the FELA in affirming the dismissal of the case. The Court's opinion is very brief (one page) and does not explain whether res judicata notions precluded the wife's recovery (since her husband previously had been denied relief) or whether it was the particular cause of action, loss of consortium, which prevented recovery.

The Tenth Circuit in Anderson v. Burlington Northern, Inc., supra, also denied recovery for loss of consortium under the FELA, citing the early Supreme Court cases (discussed above) and Jess, supra. The Court described the exclusiveness of the FELA remedy treating an action for loss of consortium as a separate action arising out of state law (even though the widow had brought the case directly under the FELA). Anderson v. Burlington Northern, Inc., supra at 289.

The Supreme Court of the Appellate Division of New York held in Spinola v. New York Central Railroad, supra, that the FELA "confers no cause of action for loss of consortium on the wife of the injured employee," and thus denied the Plaintiff employee's Motion to add his wife as party plaintiff. Spinola v. New York Central Railroad, supra at 437.

This opinion, too, was very brief, dealing with the issue summarily and citing for support Jess, supra.

Finally, in Prata v. National Railroad Passenger Corporation, supra, the Supreme Court of the Appellate Division of New York again denied a wife an action for loss of consortium under the FELA. The Court relied upon the Tonsellito case, supra, and Spinola, supra, as establishing the certainty of this holding and stated that the FELA contained "no provision for loss of consortium." Prata v. National Railroad Passenger Corp., supra at 279.

(c) A Summary

To summarize, the Supreme Court never has held recovery under the FELA to preclude damages for a wife's loss of consortium. What the Court has addressed is the exclusivity of the FELA remedy, thereby preventing state

regulation. Nor has the Supreme Court decided that the express language of the statute, or the congressional intent behind it, precludes such recovery. What the Supreme Court has said is that in 1913, the Act should be limited to pecuniary losses based upon the judicial interpretation of Lord Campbell's Act and the speculative nature of non-pecuniary damages.

Any lower court precedents going beyond the above Supreme Court holdings have a dubious foundation. Cases that rely on the exclusivity of the FELA do not address the issue presented herein, i.e., whether there is recovery for loss of consortium directly under the FELA. In addition, such cases that allegedly do address the issue have generally disposed of the case summarily leaving little by way of analysis or clarity.

3. Loss of Consortium Under the Jones Act, Death on the High Seas Act, and General Maritime Law.

(a) Background: The Jones Act.

Prior to 1915, a seaman did not have a cause of action under general maritime law for the negligence of the master or any member of the crew.[1] Congress responded to this harsh rule by passing the Jones Act, which incorporated by reference the Federal Employer's Liability Act, thus providing an action based on negligence for the injury and wrongful death of a seaman.[2] By the

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1. The Osceola, 189 U.S. 158 (1903).

2. 46 U.S.C. § 688 provides: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring and regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."(Emphasis ours)

incorporation of the FELA, precedent under the Jones Act and maritime law becomes important to the issue presented herein.

(b) Background: Death on the High Seas Act.

In response to another harsh rule under federal maritime law which did not provide recovery for the wrongful death of a non-seaman in the absence of a state or federal statute,[3] Congress enacted the Death on the High Seas Act (hereinafter DOHSA) 46 U.S.C. § 761-768 (1976). The Act provides a remedy for wrongful death occurring beyond the territorial waters of a state, but limits recovery explicity to pecuniary losses. 46 U.S.C. § 762 (1976).[4]

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3. The Harrisburg, 119 U.S. 199 (1886).

4. 46 U.S.C. § 762 provides: "The recovery in such suit shall be fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought." (Emphasis ours)

The Supreme Court has interpreted the restrictive "pecuniary" language of the statute to preclude damages for "loss of society" under federal maritime law. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978). The Court in arriving at this result stated that there was "a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." Mobil Oil Corp. v. Higginbotham, supra at 625.

(c) General Maritime Law and the "Unseaworthiness" Doctrine.

Despite the Jones Act and DOHSA, harsh rules and anomalies still remained under federal maritime law. (e.g., See Sea-Land Services v. Gaudet, 414 U.S. 573, 576-77 [1974].) Arbitrary distinctions developed depending upon various circumstances. For example, distinctions

were made based upon whether the plaintiff was a seaman versus a non-seaman (such as a longshoreman); whether the injury or death occurred inside or outside of territorial waters; and whether a remedy was provided by state statute. Sea-Land Services v. Gaudet, supra at 576-77. Some of these problems have been addressed in a recent trio of Supreme Court cases starting in 1970.

In Moragne v. States Marine Lines, 398 U.S. 375 (1970), the Supreme Court held that there was a cause of action under federal maritime law for the wrongful death of a non-seaman. This was followed by the Court's decision in Sea-Land Services, Inc. v. Gaudet, supra, which held that the dependents of a deceased longshoreman could recovery damages for loss of consortium under federal maritime law. The Court's analysis in arriving at such a decision

warrants particular attention. The Court rejects the traditional objection discussed in ARGUMENT (2) of this Petition (i.e., that such damages are speculative), as precluding recovery for such losses. As argued herein, the Court noted that a clear majority of states now permit recovery for the loss of society (e.g., love, affection and companionship). In addition, the Court stated that since the 17th Century, juries have assessed damages for loss of consortium to compensate husbands whose wives had been negligently injured. More recently, the Court said juries have been asked to measure loss of consortium suffered by wives whose husbands have been the victims of negligence. Sea-Land Services v. Gaudet, supra at 587-589.

In summary, the Supreme Court based its decision upon the past history of allowing recovery to husbands for loss

of consortium and the more recent changes in the law allowing wives the corresponding cause of action. Petitioner argues that such reasoning is equally applicable to her claim under the FELA. (See discussion infra under ARGUMENT (4) of this Petition.)

(d) The Current Status of Loss of Consortium Under the Jones Act and Maritime Law.

(i) American Export Lines, Inc., v. Alvez, 446 U.S. 274 (1980). In the last of its recent trio maritime cases, the Supreme Court extends the Gaudet analysis to allow a wife recovery for loss of consortium where the injuries to her husband were non-fatal. Petitioner contends that the Court in Alvez rejects the argument that the Jones Act precludes recovery for loss of consortium, not only under general maritime law, but under the language of the Jones Act as well. Specifically, the Court states that neither DOHSA or the

Jones Acts "embodies an 'established and inflexible' rule here foreclosing recognition of a claim for loss of society by judicially crafted general maritime law." American Export Lines, Inc. v. Alvez, supra at 282. (Emphasis added) The importance of this statement lies with the words "judicially crafted."

If judicially crafted maritime law permits an action for loss of society, would not also judicially crafted interpretations of the Jones Act (via the FELA) permit such an action? To summarize, all of the law previously discussed under the FELA (ergo the Jones Act) has been "judicially crafted," similar to general maritime law. If general maritime law is subject to change, so are the judicial interpretations of the FELA and the Jones Act. The Supreme Court lends supports to this proposition when it stated further in Alvez:

> "The Jones Act itself was not the product of careful drafting or attentive review . . .; assuming that the statute bars damages for the loss of society, it does so solely by virtue of judicial interpretation of the Federal Employers' Liability Act . . ." American Export Lines, Inc. v. Alvez, supra at 283.

Finally, in Alvez (like Gaudet), the Court emphasizes the importance of the current prevailing views about compensation for loss of society and directs attention to the majority of states which allow a wife recovery for loss of consortium. Id at 284.

(ii) Application of Alvez. Since Alvez, the Fifth Circuit has addressed the issue of whether recovery for loss of consortium is permitted under the Jones Act. Cruz v. Hendy Intern Co., 638 F.2d 719 (5th Cir. 1981), in denying such an action, the Court states that the Jones

Act creates an "integrated remedial pattern." Id at 725. Such a statement flies directly into the face of the Supreme Court's statement in Alvez that the Jones Act was "not the product of careful drafting and attentive legislative review." American Export Lines v. Alvez, supra at 283. Therefore, the Fifth Circuit's impression of the Act, at minimum, deserves skepticism. In addition, the Fifth Circuit relies upon the fact that the Supreme Court in Alvez "distinguishes" one of the Fifth Circuit's prior holdings denying recovery for loss of consortium under the Jones Act.[5] Petitioner contends that the Supreme Court did not "distinguish" such case; it merely cited Ivy as an example of a case which denied recovery under the Jones Act for loss of society due to the judicial interpretation

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5. Ivy v. Security Barge Line, Inc., 606 F.2d 524 (5th Cir. 1979).

of the FELA. Also, the fact that the Supreme Court denied certiorari in the Ivy case, supra, is not dispositive of the specific issue of whether loss of society is permitted under the Jones Act, nor is it dispositive of the issue presented herein. In fact, the only thing that the denial of certiorari is dispositive of is the Ivy case.

4. The "Crux of Petitioner's Argument: Congress did not intend to preclude damages for loss of consortium under the FELA.

The focal points of Petitioner's arguments are as follows:

(a) The language of the FELA does not preclude recovery for loss of consortium.

Congress, in 1910, did not enact a statute expressly limiting the recovery of railroad employees and their dependents to pecuniary losses, nor did Congress

expressly exclude loss of consortium. Congress knows how to sue restrictive language if it chooses to do so. The DOHSA is such an example because Congress expressly stated in the Act that only pecuniary losses could be recovered.

(b) Congressional intent behind the FELA does not preclude loss of consortium.

When Congress passed the FELA, its primary concern was to establish uniform remedies against interstate railroad carriers for negligence. (See discussion supra p. 13.) The state of negligence law at the time did not permit a wife to recover for loss of consortium. Therefore, Congress most likely did not contemplate the above issues when it passed the FELA. What Congress did contemplate was that railroad employees should recover for a railraod employer's negligence and that no broader remedies than those available

at common law for negligence should be permitted. This intent does not preclude reocvery for loss of consortium today. To the contrary, such intent keeps within the intent of uniformity since it provides for flexibility as the law of negligence develops over time. Currently, loss of consortium may be the direct and natural consequence of employer negligence. No longer do objections to its lack of pecuniary measurement prevent recovery for such losses. Therefore, it is well within the remedies for negligence contemplated under the FELA.

(c) To the extent, if any, that prior "judicially crafted" case law conflicts with allowing recovery for loss of consortium, it should be changed or clarified.

As stated previously in this Petition, recovery for loss of consortium under the FELA has not been directly addressed by the Supreme Court. Rather,

early cases spoke to the exclusivity of the law, thereby preventing state regulation. The only case which seems to, at least superficially, conflict with permitting such recovery is the Vreeland case decided in 1913. Arguably, Vreeland reflected the state of negligence law at the time and, therefore, it correctly denied recovery for non-pecuniary losses.

However, now a wife has a cause of action at common law for loss of consortium in a majority of the states. Other objections regarding the speculative nature of such damages have been rejected.

After all these years and changes, the Court should address this issue. To the extent Vreeland is in conflict with allowing damages for loss of consortium, it should be overruled.

CONCLUSION

In conclusion, and based upon the foregoing argument, Petitoner respectfully

requests the Court to grant review of her claim.

Respectfully submitted,

RICHARDSON, MURPHY & TEDESCO

By 
Allen T. Murphy, Jr.
Counsel For Record
For Petitoner

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

A. AIDA KELSAW, Plaintiff-Appellant,	)	No. 81-3517
vs.	)	DC# 81-378
UNION PACIFIC RAILROAD COMPANY, a Utah corporation, Defendant-Appellant.	)	OPINION

Appeal from the United States District Court
for the District of Oregon
Owen M. Panner, District Judge, Presiding
Argued and Submitted August 3, 1982

Before: SNEED, and SKOPIL, Circuit Judges,
and STEPHENS*, District Judge

SNEED, Circuit Judge:

Appellant Kelsaw seeks to overturn the dismissal of her complaint by the district court. In dismissing the complaint the district court held that

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*Honorable Albert Lee Stephens, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60 (1976), authorizes no cause of action by the spouse of a railroad employee for loss of consortium. We affirm.

I.

SUMMARY OF COMPLAINT

Plaintiff-Appellant alleged in her complaint that the defendant-appellee was a corporation that operated a railroad and was engaged in interstate commerce. It was also alleged that plaintiff-appellant's husband was an employee of the defendant-appellee and worked as a brakeman at the time when he was injured as a result of defendant-appellee's negligence. Because of the injury and the employer's negligence the complaint asserts that "the plaintiff has a loss of consortium claim for damages in the sum of $500,000 general damages." The prayer for relief seeks a judgment in that amount.

II.

ANALYSIS

Appellant admits that the dismissal was proper under existing law. We have held specifically that the spouse of an injured railroad employee may not sue for loss of consortium under the FELA. Jess v. Great Northern Railroad Co., 401 F.2d 535 (9th Cir. 1968). We relied on the Supreme Court's decision in New York Central & Hudson River Railroad v. Tonsellito, 244 U.S. 360 (1917), in which it was held that, although under common law a father could recover for the loss of services of a not fatally injured minor child, no such cause of action existed under FELA. The Court stated:

> "There [referring to earlier cases] we held the act 'is comprehensive and also exclusive' in respect of a railroad's liability for injuries suffered by its employees while engaging in interstate commerce.

> 'It establishes a rule or regulation which is intended to operate uniformly in all the states as respects interstate commerce, and in that field it is both paramount and exclusive.' Congress having declared when, how far, and to whom carriers shall be liable on account of accidents in the specified class, such liability can neither be extended nor abridged by common or statutory laws of the state." 244 U.S. at 361-62.

The appellant seeks to avoid the controlling effect of Tonsellito and the earlier Michigan Central Railroad v. Vreeland, 227 U.S. 59 (1913), by arguing that it has been qualified to the extent that a common law cause of action on the part of the spouse of an employee for loss of consortium is permitted to exist. She cites American Export Lines v. Alvez, 446 U.S. 274 (1980), to support her contention. In Alvez, the Court, after recognizing that under Sea-Land Services, Inc. v. Gaudet,

414 U.S. 573 (1974), a surviving spouse could recover damages for the loss of her deceased longshoreman husband's society following his mortal injury while working aboard a vessel in state territorial waters, held that the wife of a harbor worker injured nonfatally aboard a vessel in similar waters also could recover under general maritime law for the loss of her husband's society. 414 U.S. at 275-76. Neither the Death on the High Seas Act, 46 U.S.C § 762 (1976), nor the Jones Act, 46 U.S.C. § 688 (1976), under which such recoveries are not permitted, were held to bar "recognition of a claim for loss of society by judicially crafted general maritime law." 446 U.S. at 281-82. See Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978); Ivy v. Security Barge Lines, 606 F.2d 524 (5th Cir. 1979) (en banc), cert. denied 446 U.S. 956 (1980). The Court refused to engraft on general

maritime law the exclusivity accorded FELA by Tonsellito and the earlier limitation of Michigan Central Railroad v. Vreeland, supra.

In no way, however, did the Court reject either the limits placed on recoveries under FELA by Vreeland or its exclusivity as recognized by Tonsellito. Under these circumstances we must adhere to both. While it is true that the Court in Alvez looked with favor upon permitting a recovery for a loss of consortium, we have no authority to attempt to anticipate that it will overrule Tonsellito and Vreeland. Nor does the court's decision in Higginbotham encourage us to do so. If and when the Supreme Court decides to overrule Tonsellito and Vreeland we will do our duty. Until then we must obey their teaching.

AFFIRMED.

F I L E D

Sep. 9, 1982

PHILLIP B. WINBERRY
Clerk US Court of Appeals

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

AIDA KELSAW,	)	
	)	
Plaintiff,	)	Civil No. 81-378
	)	
v.	)	ORDER DENYING
	)	PLAINTIFF'S
UNION PACIFIC RAILROAD	)	MOTION FOR
COMPANY, a corporation,	)	RECONSIDERATION
	)	
Defendant.	)	

Plaintiff's Motion for Reconsideration is DENIED.

IT IS SO ORDERED.

DATED the 7th day of August, 1981.

/s/ Owen M. Panner
Owen M. Panner
United States District Judge

U.S. DISTRICT COURT
DISTRICT OF OREGON
F I L E D
AUG 7, 1981

ROBERT M. CHRIST, CLERK
By _____ Deputy

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

AIDA KELSAW, Plaintiff,	)	CIVIL 81-378
vs.	)	JUDGMENT
UNION PACIFIC RAILROAD COMPANY, a corporation, Defendant.	)	

Based on the record,

IT IS ORDERED that plaintiff shall take nothing and this action is dismissed.

DATED August 3, 1981.

/s/ Robert M. Christ
ROBERT M. CHRIST,
CLERK

U.S. DISTRICT COURT
DISTRICT OF OREGON

F I L E D

AUG 3, 1981

ROBERT M. CHRIST, CLERK
By_____ Deputy

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

AIDA KELSAW,	)	
	)	
Plaintiff,	)	Civil No. 81-378
	)	
v.	)	ORDER
	)	
UNION PACIFIC RAILROAD COMPANY, a corporation,	)	
	)	
Defendant.	)	

IT IS ORDERED that defendant's motion to dismiss is granted.

Dated this 25 day of July, 1981.

/s/ Owen M. Panner
United States District Judge

U.S. DISTRICT COURT
DISTRICT OF OREGON

F I L E D

JUL 27, 1981

ROBERT M. CHRIST, CLERK
By _____ Deputy

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

AIDA KELSAW,	)	
	)	
Plaintiff,	)	Civil No. 81-378
	)	
v.	)	FINDINGS AND
	)	RECOMMENDATION
UNION PACIFIC RAILROAD COMPANY, a corporation,	)	
	)	
Defendant.	)	

This is an action brought by the wife of an injured employee of defendant for loss of consortium. Plaintiff bases her claim on the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq. (FELA)

Defendant moves to dismiss the case because it contends that as a matter of law the spouse of an injured railroad employee does not have a claim under FELA for loss of consortium. Plaintiff agrees that the cases have held there is no claim for loss of consortium under FELA. However, plain-

tiff argues that the Supreme Court has impliedly repudiated that line of cases by recognizing the right of spouses of harborworkers under general maritime common law to sue for loss of consortium. Although plaintiff's argument is intriguing, it is not persuasive. I find that as a matter of law the spouse of an injured railroad employee may not sue for loss of consortium under FELA. Accordingly, defendant's motion to dismiss should be granted.

CASE LAW

The Ninth Circuit has specifically held that the spouse of an injured employee may not sue for loss of consortium under FELA. Jess v. Great Northern Railroad Company, 401 F.2d 535 (9th Cir. 1968). The Ninth Circuit relied on New York Central & Hudson River Railroad Company v. Tonsellito, 244 U.S. 360 (1917). In Tonsellito the Supreme Court ruled that the father of a

minor employee of a railroad was not entitled damages for loss of his son's services.

> The court of Errors and Appeals ruled, and it is now maintained, that the right of action asserted by the father existed at common law and was not taken away by the Federal Employers' Liability Act. But the contrary view, we think, is clearly settled by our recent opinions . . . . [T]he act "is comprehensive and, also, exclusive" in respect of a railroad's liability for injuries suffered by its employees while engaging in interstate commerce. "It establishes a rule or regulation which is intended to operate uniformly in all the States, as respects interstate commerce and in that field it is both paramount and exclusive." Congress having declared when, how far, and to whom carriers shall be liable on account of accidents in the specified class, such liability can neither be extended nor abridged by common or statutory laws of the State.

Id. at 362-363 (citations omitted).

PLAINTIFF'S ARGUMENT

Plaintiff's argument is based on the holding in American Export Lines, Inc. v. Alvez, 446 U.S. 274 (1980) in which

the Supreme Court recognized the right of the spouse of an injured harborworker to sue for loss of consortium under general maritime law. Plaintiff argues:

> Seaman . . . have the rights and remedies of railway employees. FELA. Since the Jones Act is the progeny of the Federal Employees [sic] Liability Act, and the Jones Act now allows for loss of consortium, this right or remedy . . . clearly should be part of the EELA.

Plaintiff is incorrect in stating that the Jones Act now allows for loss of consortium. In Alvez, the Supreme Court held that the Jones Act does not exclusively regulate longshoremen's remedies. Alvez, supra at 282-283. It then held that under general maritime common law there is a right to sue for loss of consortium

The Supreme Court did, however, criticize the Jones Act:

> The Jones Act itself was not the product of careful drafting or attentive legislative review. . .; assuming that the statute bars damages for loss of society, it does so solely by virtue of judicial interpretation of the Federal Employers' Liability Act . . . which was incorporated into the Jones Act . . . Thus a remedial omission in the Jones Act is not evidence of considered congressional policymaking that should command our adherence in analogous contexts.

Id. at 283-284 (citations omitted).

Plaintiff argues that the words "solely by virtue of judicial interpretation" encourage the conclusion that given the opportunity, the Supreme Court would recognize the right to sue for loss of consortium under FELA. I disagree.

CONCLUSION

FELA, unlike the Jones Act, is the exclusive remedy for injuries to employees who are protected by it. Tonsellito, supra at 363. The Supreme Court recognized

in Tonsellito that that exclusive remedy may not be extended by the common law. Id. The Jones Act, on the other hand, is not exclusive. Alvez, supra at 282-283. Consequently the Supreme Court in Alvez was able to look to the general maritime common law to find a right to sue for loss of consortium. It found that such a right exists at common law.

Since FELA is the exclusive remedy for injuries to railroad employees it is irrelevant in this case whether there is a common law right to sue for loss of consortium. FELA itself is the only possible source of a right to sue for loss of consortium. The Ninth Circuit has already held that FELA does not provide for such a right. Jess v. Great Northern Railroad Company, supra. I am bound by that holding to find that there is no

right under FELA for plaintiff in this action to sue for loss of consortium. Accordingly, defendant's motion to dismiss should be granted.

Dated this day of , 1981.

/s/ George E. Juba
United States Magistrate

Endorsed:
Filed 6/30/81
ROBERT M. CHRIST, CLERK

By _____
Deputy

82-1043
No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

A. AIDA KELSAW,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION

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TABLE OF AUTHORITIES

Cases

Statutes

QUESTION PRESENTED

Whether the spouse of an injured railroad[1] employee may recover for loss of consortium under the Federal Employers Liability Act.

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[1]Respondent Union Pacific Railroad Company is a wholly-owned subsidiary ultimately of Union Pacific Corporation. Respondent has a number of subsidiaries and affiliates which are wholly owned. The only subsidiaries or affiliates which have any outside ownership are:

Alameda Belt Line
Alton & Southern Railway Company
Brownsville & Matamoros Bridge Co.
Camas Prairie Railroad Company
Galveston Houston and Henderson Railroad Co.
Houston Belt & Terminal Railway Co.
Jefferson Southwestern Railroad Co.
Los Angeles & Salt Lake Railroad Company
Missouri Pacific Corporation
Oakland Terminal Railway
Portland Traction Company
Southern Illinois and Missouri Bridge Co.
St. Joseph Terminal Railway Company
The Ogden Union Railway & Depot Company
The Weatherford Mineral Wells and Northwestern
The Western Pacific Railroad Company
UINTA Development Corporation
Union Pacific Resources Ltd.

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ON PETITION FOR A WRIT OF CERTIORARI TO
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FOR THE NINTH CIRCUIT

**BRIEF OF RESPONDENT IN OPPOSITION
TO THE PETITION**

STATEMENT OF THE CASE

Respondent accepts Petitioner's statement of the case. The opinion of the Ninth Circuit, affirming the Trial Court's dismissal of the Complaint, is reported at 686 F.2d 819.

REASONS FOR DENYING THE PETITION

I.

The Decision Below Is Clearly Correct And Is In No Way A Departure From Usual Judicial Procedure.

The Court of Appeals followed well established precedent and clear statutory language in holding that the Federal Employers Liability Act precludes any claim for loss of consortium by the spouse of an injured railroad employee. The Federal Employers Liability Act, 45 USC § 51, et seq., provides separate and distinctly stated remedies to a railroad employee who has been injured by his employer's negligence, on the one hand, and to listed survivors (including the spouse) of a railroad employee who has been killed by his employer's negligence, on the other. *Michigan Central Railroad v. Vreeland,* (1913) 227 U.S. 59, 65, 33 S.Ct. 192, 57 L.Ed. 417.[2] Under the express language of the statute no remedy was created for the spouse or other dependents of a non-fatally injured employee.

The Ninth Circuit Court of Appeals has previously decided this identical issue in *Jess v. Great Northern Railway Company,* (9th Cir. 1968) 401 F.2d. 535. There the court *en banc* affirmed dismissal of a claim for loss of consortium brought by the spouse of an injured railroad worker, on the ground that the Federal Employers Liability Act barred such a claim. *Jess* was based on *New York Central & Hudson River Railroad Com-*

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[2]The validity of the *Vreeland* analysis was confirmed most recently by this Court in *Norfolk & Western R. Co. v. Liepelt,* (1980) 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689.

pany v. Tonsellito, (1917) 244 U.S. 360, 37 S.Ct. 620, 61 L.Ed. 1194. In *Tonsellito,* this court held that the father of an injured 17-year old railroad worker had no cause of action for the loss of services of his son, because the Federal Employers Liability Act preempted the field and precluded all remedies not expressly included in its coverage.

II.

There Is No Conflict Between The Decision Of The Ninth Circuit Court Of Appeals And Any Other Federal Circuit Court Or State Court.

No court, state or federal, has ever recognized the right of the spouse of an injured railroad worker to bring an action for loss of consortium. The decision of the Ninth Circuit in this case is in accord with the Tenth Circuit, the only other Federal Court of Appeals to have ruled on the matter. *Anderson v. Burlington Northern, Inc.,* (10th Cir. 1972) 469 F.2d 288. In that case, the Tenth Circuit denied recovery on a claim for loss of consortium brought by a spouse both under the Federal Employers Liability Act, and under common law.

III.

The Issue Is Well Settled In This Court And Is Not Sufficiently Important To Warrant Review.

In 1917 in *Tonsellito, supra,* this court held that the Federal Employers Liability Act barred the relative of an injured railroad employee from recovering for loss of services because the act preempted all such common law remedies and limited recovery to the listed statutory beneficiaries. For 65 years railroad cases have been tried and resolved under these principles. Congress, while amending the Federal Employers Liability act in 1939 to modify certain judicial holdings[3] has not changed this aspect of the statute.

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[3]45 USC §§ 51 and 54 were amended by Congress in 1939 to enlarge the scope of the act over nearly all railroad employees, and to restrict the use of assumption of risk as a defense.

The Admiralty decisions relied on by Petitioner have not changed this rule in any way. *American Export Lines, Inc. v. Alvez,* (1980) 446 U.S. 274, 100 S.Ct. 1673, 64 L.Ed.2d 284, created a right of action for loss of consortium in general maritime law only. Admiralty has always been more liberal in its recoveries than other areas of the law due to the unique status afforded maritime employees. However, even in Admiralty this Court has refused to engraft loss of consortium onto statutory remedies which do not provide for it. *Mobil Oil Corp. v. Higginbotham,* (1978) 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581. Thus, *Alvez, supra,* in no way affects the Federal Employers Liability Act, a statutory remedy with no parallel body of common law remedies.

This case involves no issue of constitutional law. It is solely one of statutory interpretation based on well established cases and unambiguous language.

CONCLUSION

The decision below is clearly correct and based upon the express language of the statute and long standing precedent, including prior decisions of this court. There is no conflict between the circuits or with the decision of any state court. The decision does not involve any constitutional or important new federal issue other than mere statutory construction which has been well settled by consistent previous decisions. Therefore, the petition presents nothing for review and should be denied.

Respectfully submitted,

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Of Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Brief of Respondent in Opposition to the Petition on Allen T. Murphy, Jr., Attorney for Petitioner, on the 4th day of January, 1983, by mailing at a United States Post Office three correct copies thereof, certified by me as such, contained in a sealed envelope with postage prepaid, to said attorney at his post office address, to wit:

Mr. Allen T. Murphy, Jr.
Richardson, Murphy & Tedesco
210 Century Tower
1201 S. W. 12th Avenue
Portland, Oregon 97205

Dated: January 4, 1983.

Roy P. Farwell
Roy P. Farwell
Attorney for Respondent